Pamela Esther a/p Clementy Sebestian v Hospital Fatimah Ipoh & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCVC-35–03 OF 2018
MOHD RADZI JC
29 MARCH 2019

Civil Procedure — Preliminary question of law — Rules of Court 2012, O 14A, O 33 — Preliminary trial to determine question of law — Purpose of preliminary trial — Instances when preliminary trial should be held – Whether court could conclusively determine the question of law through preliminary hearing — Employees' Social Security Act 1969 s 31

This was the defendant's application to hold a preliminary trial in accordance with O 33 r 2 of the Rules of Court 2012 ('the ROC') to determine a certain question of law should be conducted before the trial of the main suit. The plaintiff and the second defendant, who were both nurses were assisting the doctor on duty to conduct a scoping procedure on a patient diagnosed with HIV. The plaintiff alleged that the second defendant had caused the said needle to be inserted into the plaintiff's right hand palm. The plaintiff, who at the time was 16-weeks pregnant into her first pregnancy was placed under immediate medical attention and subsequent HIV screening and treatment. The plaintiff thus far, had been cleared of HIV/AIDS infection. The plaintiff had then filed the main suit. The defendant then subsequently filed their application for a legal question to be dealt with under O 14A and/or O 32 r 2 of the ROC. However, the court ruled that the question of law was not suitable to be dealt with under O 14A and that the question of law could instead be dealt with under O 33 r 2 of the ROC to which the court then directed the defendant's question of law to be amended slightly. Both parties did not offer any witness to appear before the court. The plaintiff urged the court to consider the pleadings and affidavits that had been filed which showed that there existed intrinsic evidence that must be considered by this court through the calling of witnesses at a full trial, thus the court must not allow the question of law to be resolved through O 32 r 5. The defendant submitted that the intrinsic evidence raised by the plaintiff should be disregarded as both parties had informed the court that there would be no more evidence to be provided to this court other than the affidavit evidence.

Held, ordering the main suit be kept alive and the question of law as drafted by the court for the purposes of the preliminary hearing be joined with the other questions of facts and law to be determined by the court at a full trial:

(1) The purpose of an O 33 r 2 preliminary trial was to save costs and time by determining a fundamental legal question in advance of the main trial to avoid an unnecessary protracted trial (see para 7).

(2) A trial of a preliminary point of law should not be made where there were facts in dispute. In the present case, the fundamental facts that led to the main suit were mostly undisputed (see para 9).

(3) Order 33 r 2 should not be invoked unless the trial of that issue would result in substantial savings in judicial time and costs (see para 11).

(4) In the event the court finds, after the said preliminary trial, and upon perusing the affidavit evidence available before it that: (a) it could conclusively decide on the said preliminary question of law; and (b) the preliminary questions of law renders the trial of the cause or matter unnecessary, the court can then dismiss the plaintiff's cause of matter in the main suit as provided for under O 33 r 5 of the ROC (see para 13).

(5) The legal issue as crafted which was fundamentally based on the legal issue set out in the defendant's application, merited determination by way of a full hearing and could not be dispensed with pursuant to an O 33 r 2 proceeding (see para 15).

(6) Pursuant to s 31 of the Employees' Social Security Act 1969 ('the SOCSO Act'), there were three substantive questions that must be answered in the affirmative, the consequential effect was that the legal question posed would also be answered in the affirmative. These three questions were: (a) whether the plaintiff was an insured person within the meaning of s 2 of the SOCSO Act; (b) could it be positively and conclusively established that the plaintiff suffered the injury, that was the subject matter in the main suit brought by the plaintiff, in the course of her employment, as defined under s 2(6) and the other relevant provisions of the SOCSO Act; and (c) could it be positively and conclusively established that the first defendant was the plaintiff's and the second defendant's employer, and consequentially the plaintiff and the second defendant were employees of the first defendant, as defined under s 2 of the SOCSO Act. Upon careful perusal only the first question had been fulfilled and positively answered, the second and third questions had not been proven or shown to the satisfaction of the court as to enable the court to conclusively conclude the preliminary question of law posed to the court at this stage (see para 16).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan untuk mengadakan satu pendengaran awal selaras dengan A 33 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menentukan soalan undang-undang yang perlu ditentukan sebelum perbicaraan utama. Plaintif dan defendan kedua, yang kedua-duanya

merupakan jururawat telah membantu doktor yang bertugas untuk mengendalikan prosedur skop ke atas satu pesakit yang menghidapi HIV. Plaintif menyatakan bahawa defendan kedua telah menyebabkan satu jarum dimasukkan ke tapak tangan kanan plaintif. Plaintif, yang pada masa tersebut mengandung selama tempoh 16-minggu dalam kehamilan pertamanya diletakkan di bawah pemerhatian perubatan secara segera dan kemudiannya saringan dan rawatan HIV. Plaintif, setakat ini, tidak menunjukan apa-apa kesan jangkitan HIV/AIDS. Plaintif telah kemudiannya memfailkan tuntutan utama. Defendan kemudiannya memfailkan permohonan mereka agar satu soalan perundangan di jawab di bawah A 14A dan/atau A 32 k 2 KKM. Namun, mahkamah memutuskan bahawa persoalan undang-undang tersebut tidak sesuai diuruskan di bawah A 14A namun, persoalan undang-undang tersebut sewajarnya diuruskan di bawah A 33 k 2 KKM yang mana mahkamah kemudiannya mengarahkan agar persoalan undang-undang tersebut dipinda. Kedua-dua pihak tidak menawarkan apa-apa saksi untuk hadir di hadapan mahkamah. Plaintif menghujahkan bahawa wujud keterangan intrinsik yang perlu dipertimbangkan oleh mahkamah ini melalui tindakan memanggil saksi sewaktu perbicaraan penuh, oleh yang demikian, mahkamah ini tidak harus membenarkan persoalan undang-undang tersebut diselesaikan melalui A 32 k 5. Defendan menghujahkan bahawa keterangan intrinsik yang dibangkitkan plaintif harus diketepikan kerana kedua-dua pihak telah memaklumkan mahkamah bahawa tiada lagi keterangan akan dikemukakan di hadapan mahkamah ini selain daripada keterangan afidavit.

Diputuskan, memerintahkan guaman utama diteruskan dan soalan undang-undang yang dideraf oleh mahkamah untuk tujuan pendengaran awal dimasukkan sekali dengan persoalan fakta dan undang-undang lain yang akan ditentukan oleh mahkamah sewaktu perbicaraan penuh:

(1) Tujuan pendengaran awal di bawah A 33 k 2 adalah untuk menjimatkan kos dan masa dengan menentukan persoalan undang-undang asas sebelum perbicaraan utama untuk mengelakkan satu perbicaraan berpanjangan (lihat perenggan 7).

(2) Perbicaraan atas persoalan undang-undang awal tidak sepatutnya di buat apabila wujud fakta yang dipertikaikan. Dalam kes ini, fakta asas yang membawa kepada guaman utama secara amnya tidak dipertikaikan (lihat perenggan 9).

(3) Aturan 33 k 2 tidak sepatutnya diguna pakai kecuali perbicaraan isu tersebut akan menyebabkan penjimatan masa dan kos kehakiman yang substantif (lihat perenggan 11).

(4) Sekiranya mahkamah mendapati, selepas pendengaran awal tersebut, dan setelah mengamati keterangan afidavit di hadapannya bahawa: (a) ianya boleh secara konklusif memutuskan persoalan undang-undang awal tersebut; dan (b) persoalan undang-undang awal menyebabkan

perbicaraan atau tindakan perkara tersebut tidak perlu, mahkamah kemudiannya boleh mengetepikan tindakan plaintif dalam tindakan utama seperti mana tertakluk di bawah A 33 k 5 KKM (lihat perenggan 13).

(5) Isu undang-undang yang di buat yang mana berasaskan isu undang-undang permohonan defendan, perlu diputuskan melalui perbicaraan penuh dan tidak boleh diputuskan di bawah prosiding A 32 k 2 (lihat perenggan 15).

(6) Selaras dengan s 31 Akta Keselamatan Sosial Pekerja 1969 ('AKSP'), yang mana wujud tiga persoalan substantif yang perlu dijawab secara positif, kesannya adalah persoalan yang dibawa kehadapan mahkamah juga akan dijawab secara positif. Tiga persoalan ini adalah: (a) sama ada plaintif merupakan orang berinsurans seperti mana makna s 2 AKSP; (b) sama ada ianya boleh secara positif dan konklusif ditentukan bahawa plaintif telah mengalami kecederaan tersebut, yang merupakan perkara dalam tindakan yang dibawa oleh plaintif, dalam perjalanan pekerjaan plaintif, seperti mana takrifan di bawah s 2(6) dan semua peruntukan relevan lain AKSP; dan (c) sama ada ianya boleh secara positif dan konklusif dibuktikan bahawa defendan pertama merupakan majikan plaintif dan defendan kedua, dan seterusnya plaintif dan defendan kedua merupakan pekerja defendan pertama, seperti mana takrifan dibawah s 2 AKSP. Setelah diteliti, hanya persoalan pertama telah dipenuhi dan dijawab secara positif, soalan kedua dan ketiga tidak dibuktikan atau ditunjukkan kepada mahkamah untuk membenarkan mahkamah memutuskan secara konklusif persoalan undang-undang awal yang dihadapkan kepada mahkamah di peringkat ini (lihat perenggan 16).]

Notes

For a case on Rules of Court 2012, O 14A, O 33, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8150.

Cases referred to

Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor [2009] 7 MLJ 627; [2008] 3 MLRH 328; [2009] 1 CLJ 916; [2008] 1 LNS 507, HC (folld)

Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor [1997] 2 MLJ 252; [1997] 3 CLJ 807, CA (refd)

Everett v Ribbands and another [1952] 2 QB 198, CA (refd)

Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390, CA (folld)

Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (folld)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474; [1991] 3 CLJ

2781; [1991] 1 CLJ Rep 321, SC (folld)
Palaniappa Chettiar v Sithambaram Chettiar & Ors [1982] 1 MLJ 186, FC (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2007] 7 MLJ 706, CA (refd)
Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705, HC (folld)
Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-Operative Society [1997] 4 MLJ 82, HC (folld)

Legislation referred to

Rules of Court 2012 O 14A, O 32 r 5, O 33 rr 2, 5
Employees' Social Security Act 1969 ss 2, 2(6), 31

Mohammad Salihen Manstor (Ranjit Singh Sandhu & Co) for the plaintiff.
WL Wong (Sarah Low with him) (Azim, Tunku Farik & Wong) for the defendants.

Mohd Radzi JC:

[1] Pursuant to an application filed by the defendants, this court had ruled that a preliminary trial in accordance with O 33 r 2 of the Rules of Court 2012 ('the ROC 2012') to determine a certain question of law should be conducted before the trial of the main suit. Upon holding that preliminary trial, this court made a finding that the said question of law cannot be conclusively determined. This court then ordered that the said question of law shall join the other questions of facts and law to be determined by this court at a full trial.

[2] The defendants were aggrieved and filed this appeal. The following are the grounds for my finding.

BACKGROUND

[3] On 3 July 2013, the plaintiff and the second defendant, both nurses at the first defendant hospital, were on duty to assist Dr Yeap Yean Lian to conduct a 'scoping' procedure on TCS, a patient diagnosed with HIV. Whilst removing out the needle from TCS, the plaintiff alleged that the second defendant had caused the said needle to be inserted into the plaintiff's right hand palm. The plaintiff, whom at that time was 16-weeks into her first pregnancy, had been placed under immediate medical attention and subsequent HIV screening and treatment. The pleadings before this court showed that the plaintiff, thus far, has been cleared of HIV/AIDS infection.

[4] On 14 March 2018, the plaintiff filed a one million Ringgit suit, excluding claims for other damages, against the defendants ('main suit').

[5] The defendants then filed their application (encl 10) for the following legal question to be dealt with under O 14A and/or O 33 r 2 of the Rules of Court 2012 ('the ROC 2012'):

> Sama ada Plaintif sebagai seorang penyumbang kepada Keselamatan Sosial Pekerja 1969 pada setiap masa material dan juga sebagai seorang orang yang diinsuranskan di bawah Akta Keselamatan Sosial Pekerja 1969 dihalang oleh peruntukan seksyen 31 Akta Keselamatan Sosial Pekerja 1969 untuk menerima atau mendapat sebarang pampasan atau ganti rugi daripada Defendan Pertama sebagai majikannya pada masa yang material atau daripada Defendan Kedua sebagai pekerja Defendan Pertama pada masa yang material berkenaan tuntutan bencana kerja yang kononnya dialami olehnya sebagai seorang pekerja Defendan Pertama dan sebagai rakan sekerja Defendan Kedua pada setiap masa yang material.

[6] On 12 November 2018 this court ruled that the above question of law is not suitable to be dealt with under O 14A. However, this court further ruled that the question of law drafted by the defendants in their application could be dealt with pursuant to O 33 r 2 of the ROC 2012. Applying the final limb in that provision which provides:

> and (the Court) may give directions as to the manner in which the question or issue shall be stated

This court had directed that the said question of law as drafted by the defendants shall be slightly amended as below:

> Sama ada Plaintif sebagai seorang penyumbang kepada Pertubuhan Keselamatan Sosial (SOCSO) dan diinsuranskan di bawah Akta Keselamatan Sosial Pekerja 1969 (Akta 4) ('Akta SOCSO') dihalang oleh peruntukan s 31 Akta SOCS untuk menerima atau mendapat sebarang pampasan atau ganti rugi daripada Defendan Pertama sebagai majikannya atau daripada Defendan Kedua, sebagai pekerja Defendan Pertama berkenaan tuntutan bencana kerja.

FINDINGS

[7] When this court made its ruling to call for the preliminary inquiry under O 33 r 2 of the ROC 2012, I had applied the principle laid down in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390, *Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-Operative Society* [1997] 4 MLJ 82 and *Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705 that the purpose of O 33 r 2 preliminary trial is to save costs and time by determining a fundamental legal question in advance of the main trial. Such conclusion could avoid an unnecessary protracted trial. I had at that point of time asked myself whether there are merits in the application to warrant the court to exercise its power under O 33 r 2 of the ROC 2012 and order that those questions or issues posed by the defendants in this application be tried before this action goes on trial as a whole and whether the trial of those

A preliminary questions or issues will result in a substantial saving of time and expenditure.

[8] I had applied the principle laid down in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474; [1991] 3 CLJ 2781; [1991] 1 CLJ Rep 321, when the then Supreme Court vigorously applied the principle that was laid down in the case of *Everett v Ribbands and another* [1952] 2 QB 198 and said through the judgment of Jemuri Serjan CJ (Borneo)(as His Lordship then was):

> We would interpolate to say that O 33 r 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities.

[9] I had also appraised myself of the principle laid down by the Court of Appeal in *Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252; [1997] 3 CLJ 807 that a trial of a preliminary point of law should not be made where there were facts in dispute. The fundamental facts that led to the main suit were mostly undisputed.

[10] As to the appropriateness of the application, I had applied the principle laid down by Mohd Hishamudin Yunus J (as he then was) in *Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor* [2009] 7 MLJ 627; [2008] 3 MLRH 328; [2009] 1 CLJ 916; [2008] 1 LNS 507 where His Lordship said at p 642 (MLJ); p 341 (MLRH):

> In my judgment, when the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, as has happened in the present case, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke O 4A, but to invoke O 32 r 2 and r 5 of the RHC.

[11] I had cautioned myself further that I should not invoke O 33 r 2 'unless the trial of that issue will result in substantial savings in judicial time and costs': *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2007] 7 MLJ 706, *Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186.

[12] In essence, I had also applied the four principles as laid down in *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149, when Abdul Malik Ishak J (as he then was) said this:

> The principles of law that can be distilled from the long line of established authorities may conveniently be marshalled in these terms:

(i) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter;

(ii) that the application under O 33 r 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced;

(iii) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and

(iv) that the court should be wary and warn itself against the abuse of this process.

[13] In the event that this court finds, after the said preliminary trial, and upon perusing the affidavit evidence available before it, that:

(a) it could conclusively decide on the said preliminary question of law; and

(b) the preliminary question of law renders the trial of the cause or matter unnecessary,

this court could dismiss the plaintiff's cause of matter in the main suit, as provided under O 33 r 5 of the ROC 2012.

[14] At the preliminary trial held on 12 December 2018, both learned counsels did not offer any witness to appear before this court. Learned counsel for the plaintiff urged the court to consider the pleadings and affidavits that had been filed which showed that there exists intrinsic evidence that must be considered by this court through the calling of witnesses at a full trial. Thus, this court must not allow the question of law to be resolved through O 32 r 5. Learned counsel for the defendant pointed out to the court that at the hearing of the defendants' application in encl 10, in answering question posed by this court, both parties had informed the court that there will be no more evidence to be provided to this court other than the affidavit evidence. As such, the issue of intrinsic evidence raised by the plaintiff's counsel should be disregarded. He urged this court to consider the defendants' case and question of law posed to this court and conclusively determine the matter pursuant to O 32 r 5 of the ROC 2012.

[15] Upon appraising myself with the evidence in the affidavits filed before me, and upon considering the written and oral submissions of learned counsel for the defendants (the plaintiff's counsel only resorted to oral submission), I hold the view that the legal issue as I had crafted, which was fundamentally

based on the legal issue set out in the defendants' application in encl 10, merits determination by way of a full hearing and cannot be dispensed with pursuant to an O 33 r 2 proceeding.

[16] Upon conducting the preliminary hearing, I found that pursuant to s 31 of the SOCSO Act, there are three substantive questions that must be answered in the affirmative. It is my finding that if all these three questions are answered affirmatively, the consequential effect is that the legal question posed would also be answered in the affirmative. These three questions are:

(a) is the plaintiff an insured person within the meaning of s 2 of the SOCSO Act?

(b) could it be positively and conclusively established that the plaintiff suffered the injury, that was the subject matter in the main suit brought by the plaintiff, in the course of her employment, as defined under s 2(6) and the other relevant provisions of the SOCSO Act? and

(c) could it be positively and conclusively established that the 1st defendant was the plaintiff's and the second defendant's employer, and consequentially the plaintiff and the second defendant were employees of the first defendant, as defined under s 2 of the SOCSO Act?

[17] Upon my careful perusal of the affidavits, I can positively conclude that only the first question had been fulfilled and positively answered. I am satisfied that the plaintiff is an insured person within the meaning of the SOCSO Act.

[18] However, it is my finding that the second and third questions have not been proven or shown to my satisfaction such as to enable me to conclusively conclude the preliminary question of law posed to this court at this stage.

[19] I therefore rule that question of law so crafted for my consideration cannot be conclusively determined despite the preliminary hearing that I had conducted pursuant to O 33 r 2.

[20] I had used my powers provided under the final limb of O 32 r 5 which provides:

> ... or make such other order or give such judgment therein as may be just.

And decided that it is just and appropriate to keep the main suit alive and to order that the question of law as drafted by this court for purposes of this preliminary hearing joins the other questions of facts and law to be determined by this court at a full trial.

Order accordingly.

Reported by Izzat Fauzan